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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 531

S. BUCHSBAUM & CO., INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDWIN J. MCDERMOTT,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute, Regulation and Rule Provisions Involved	2
Statement	2
Reasons for granting the writ	6
1. This case raises an important question of procedure before the Court of Claims which has not been, but should be, settled by this Court	6
2. The action of the Court of Claims in directing entry of summary judgment for respondent is inconsistent with decisions of the Court of Appeals	9
Conclusion	15
Appendix	16

Citations

Cases:

Arenas v. *United States*, 322 U.S. 419 (1944)	6
Arnstein v. *Porter*, 2d Cir. 1946, 154 F. 2d 464	13
Associated Press v. *United States*, 326 U.S. 1 (1945)	6
Avrick v. *Rockmont Envelope Co.*, 10th Cir., 1946, 155 F. 2d 568	11
Begnaud v. *White*, 6th Cir., 1948, 170 F. 2d 323	15
Boro Hall Corporation v. *General Motors Corporation*, 2d Cir., 1947, 164 F. 2d 770	14
Bozant v. *Bank of New York*, 2d Cir., 1946, 156 F. 2d 787	7
Butcher v. *United Electric Coal Co.*, 7th Cir., 1949, 174 F. 2d 1003	11

Page

Colby v. *Klune*, 2d Cir., 1949, 178 F. 2d 872 ..... 13, 14
Colgate-Palmolive-Peet Co. v. *United States*, 320 U.S. 420 (1943) 10
Detsch & Co. v. *American Products Co.*, 9th Cir., 1945, 132 F. 2d 473 14
Dewey v. *Clarke*, D. of C. Court of Appeals, 1949, 180 F. 2d 766 11
Doehler Metal Furniture Co. v. *United States*, 2d Cir., 1945, 149 F. 2d 130 ..... 7, 13
Firemen's Mut. Ins. Co. v. *Aponang Mfg. Co.*, 5th Cir., 1945, 149 F. 2d 539 13
Fogelson v. *American Woolen Co.*, 2d Cir., 1947, 170 F. 2d 660 11
Furton v. *City of Menasha*, 7th Cir., 1945, 149 F. 2d 945 11
Gray Tool Co. v. *Humble Oil & Refining Co.*, 5th Cir., 1951, 186 F. 2d 365 7
Hawkins v. *Frick-Reid Supply Corporation*, 5th Cir., 1946, 154 F. 2d 88 11
Helvering v. *Midland Mut. Life Ins. Co.*, 300 U.S. 216 (1937) 10
Hunter v. *Mitchell*, D. of C. Court of Appeals, 1950, 180 F. 2d 763 11
Kasper v. *Baron*, 8th Cir., 1951, 191 F. 2d 737 11
Kennedy v. *Silas Mason*, 334 U.S. 249 (1948) 6, 8
Merchants' Indemnity Corporation of New York v. *Peterson*, 3d Cir., 1940, 113 F. 2d 4 15
Minor v. *Washington Terminal Co.*, D. of C. Court of Appeals, 1950, 180 F. 2d 10 11
Neuberger v. *Commissioner*, 311 U.S. 83 (1940) 10
Rosenman v. *United States*, 323 U.S. 658 (1944) 10
St. Louis K. & S. E. R. v. *United States*, 267 U.S. 346 (1925) 13
Sarnoff v. *Ciaglia*, 3d Cir., 1947, 165 F. 2d 176 ..... 13, 15
Sartor v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) 6, 7, 8, 14
Smyth v. *United States*, 302 U.S. 319 (1937) 8
Stevens v. *Howard D. Johnson Co.*, 4th Cir., 1950, 181 F. 2d 390 7

Page

Toebelman v. *Missouri-Kansas Pipe Line Co.*, 3d Cir., 1943, 130 F. 2d 1016 14
United States v. *Benedict*, 338 U.S. 692 (1949) .. 10
United States v. *Gypsum Co.*, 340 U.S. 76 (1950) 6
United States v. *Standard Rice Co.*, 323 U.S. 106 (1944) 10
Wittlin v. *Giacalone*, D. of C. Court of Appeals, 1946, 154 F. 2d 20 13

Statutes and Rules:

Contract Settlement Act of 1944 (58 Stat. 649, 41 U.S.C. Sect. 101-125) 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16
Judicial Code, 28 U.S.C. Sect. 1255(1) 1, 7
Judicial Code, 28 U.S.C. Sect. 1346 ..... 8, 9
Judicial Code, 28 U.S.C. Sect. 1491 to 1505 ..... 8, 9
Rule 56, Federal Rules of Civil Procedure .. 6, 9, 15, 16
Rule 51, Rules of the United States Court of Claims, revised May 15, 1951 ..... 6, 9, 15, 16

Miscellaneous:

War Department Procurement Regulation 308-H (Federal Register, August 25, 1945, Part II, 10 F. R. 10489) 3, 4, 12, 18

SUPREME COURT OF THE UNITED STATES

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S. BUCHSBAUM & CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

S. Buchsbaum & Co., Inc. prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled case on July 15, 1952

Opinion Below

The opinion of the Court of Claims (R. 3) is reported in 105 F. Supp. 821.

Jurisdiction

The judgment of the Court of Claims was entered July 15, 1952 (R. 6). A timely motion for rehearing was denied October 7, 1952 (R. 7). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

Questions Presented

1. When the question is one of intention, as expressed in a letter which does not clearly indicate that it requests statutory relief, and extrinsic evidence is offered that it does not, may the issue be resolved by the Court of Claims upon a motion for summary judgment?

2. Where there are different versions as to the purpose of a claim, whether under a contract or a statute and whether the agency involved acted thereon pursuant to such statute, which versions depend for proof upon the credibility of witnesses and upon cross examination of adverse witnesses, may the issues be resolved by the Court of Claims upon a motion for summary judgment?

Statute, Regulation and Rule Provisions Involved

The pertinent portions of the statute, regulation and rule provisions involved are set forth in the Appendix, infra, pp. 16 to 19.

Statement

This action was instituted by petitioner under Section 17 (a) of the Contract Settlement Act of 1944 (58 Stat. 649) to recover the sum of $56,294.30.

Petitioner and respondent on December 7, 1944 entered into contract W33-038 ac 5950 (R. 7) for 2,677 sets of various types of tailored airplane paulins in the aggregate sum of $868,560.70. Various changes in the contract specifications were ordered by respondent only some of which had been reduced to change orders when on August 15, 1945 the contract was totally terminated by respondent for its convenience (R. 58). Petitioner on September 7, 1945 filed a request for a change order amounting to $65,381,58 to cover certain additional costs expended at respondent's directions (R. 11 to 57). A revision thereof was requested

by respondent but no action was taken thereon because of the volume of work arising from V-J day terminations (R. 75). On February 16, 1946 petitioner and respondent entered into a termination supplemental agreement (R. 57) providing for compensation for petitioner's termination costs, which contained a provision whereby petitioner released respondent from liability, except inter alia, petitioner's right to receive reimbursement for additional costs in the event respondent be found liable therefor "under appropriate procedure under Section 17a of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations" (R. 60).

By letter dated April 10, 1946 petitioner submitted a "Request for Price Increase" under contract No. W33-038 ac 5950 for $65,381.58 (R. 60) and set forth the same costs as it had presented under date of September 7, 1945. By letter dated July 25, 1946 the contracting officer of the Chicago Procurement Field Office, Air Material Command, informed petitioner that the portion of petitioner's request for price increase embraced in paragraph 1 of petitioner's letter dated April 10, 1946 was considered by that office to qualify for approval under Procurement Regulation 308-H; directed petitioner to submit that portion of its request for price increase, prepared as a claim in accordance with instructions; stated that such claim would receive the Chicago Procurement Field Office's approval and be forwarded to Headquarters, Air Material Command for further action; but that the balance of the contents of the request for price increase were considered to be ineligible for approval because of lack of adequate legal consideration (R. 63). By a subsequent letter dated October 9, 1946 the contracting officer at the Chicago AAF Procurement Field Office informed petitioner that the claim for price increase under contract No. W33-038 ac

5950 was denied because there were no facts which provided adequate legal consideration for an increase in price for the articles furnished by petitioner under the contract.

Pursuant to the letter dated July 25, 1946 petitioner, by letter dated August 5, 1946, presented a request for price increase of $8,358.63 (R. 64). The contracting officer at Headquarters, Air Material Command, by letter dated August 16, 1946 (R. 67) informed petitioner that its claim for reimbursement in the amount of $8,358.63 had been forwarded for processing in accordance with Section 17 of the Contract Settlement Act of 1944 and Procurement Regulation 308-H; requested petitioner to furnish certain information in accordance with instructions which were enclosed with said letter, and stated that no further action would be taken until such information was received. Petitioner by letter dated September 7, 1946 furnished an affidavit stating its claim for reimbursement with the information required, and stated that the costs amounting to $8,358.63 were part of its request for change order filed September 7, 1945, revision of which had been requested by respondent in November, 1945, but which revision had been delayed until April 10, 1946 because of the time required for completion of termination settlements (R. 71). Under date of November 13, 1946 the parties entered into supplemental agreement providing for reimbursement to petitioner in the sum of $8,358.63 (R. 77).

On January 30, 1948, petitioner filed with Headquarters, Air Material Command its claim under Section 17a of the Contract Settlement Act of 1944 for $56,294.30 as compensation for costs it had incurred under contract No. W33-038 ac 5950 (R. 79). On May 22, 1950 the contracting agency denied petitioner's claim under Section 17a of the Contract Settlement Act of 1944 (R. 89). Pur-

suant to Section 13 of the Contract Settlement Act of 1944, petitioner on June 21, 1950 appealed to the Office of Contract Settlement Appeal Board (R. 90). The Appeal Board on December 20, 1950 dismissed petitioner's appeal on the ground that petitioner was bound by the decisions rendered by the contracting officer on July 25, 1946 and October 9, 1946 because petitioner had not appealed therefrom; that while under the evidence it was possible that petitioner had not by its letter dated April 10, 1946 made a claim under Section 17a of the Contract Settlement Act of 1944 and that it had not been denied thereunder, yet there was a burden of proof upon petitioner in appealing from the contracting officer's decision which petitioner had failed to sustain (R. 91).

Petitioner instituted this action in the Court of Claims on March 20, 1951 (R. 1). On January 16, 1952 respondent filed motion for summary judgment pursuant to Rule 51b of the Rules of the United States Court of Claims, revised May 15, 1951, basing such motion upon the documents above referred to (R. 3). On July 15, 1952 the Court of Claims granted the motion and dismissed the petition upon the ground that petitioner having on February 16, 1946 released respondent from all liability except that arising under Section 17a of the Contract Settlement Act of 1944, petitioner's request for contract price increase of April 10, 1946 must have been intended as a claim under the statute and that petitioner was bound by the contracting officer's decisions of July 25, 1946 and October 9, 1946 from which it had failed to appeal (R. 3). A timely motion for rehearing was filed by petitioner which the Court of Claims overruled on October 7, 1952 (R. 7).

Reasons for Granting Writ

1. *This case raises an important question of procedure before the Court of Claims which has not been, but should be, settled by this Court.*

The Court has had occasion to consider the impact of Rule 56 of the Federal Rules of Civil Procedure which provides for the entry of summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The Court has said, "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of fact".[2]

The Court of Claims adopted Rule 51 providing for Summary Judgment when it revised its rules on May 15, 1951 and stated in a preface to the revised rules that its Rule 51 was based upon and derived from Rule 56 of F.R.C.P.[3] Summary judgment is to be rendered if, but only if, the papers on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

This rule introduced for the first time summary judgment procedure into practice before the Court of Claims. On the whole it has had a salutory effect in making possible the prompt disposal without trial of those cases in which there is no genuine issue of fact. Undue expansion of the procedure, however carries with it grave dangers both for litigants and the court.

The importance of summary judgment procedure before

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[1] *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 623 (1944); *Arenas* v. *United States*, 322 U. S. 419, 434 (1944); *Associated Press* v. *United States*, 326 U. S. 1, 6 (1945); *Kennedy* v. *Silas Mason*, 334 U. S. 249, 256 (1948); *United States* v. *Gypsum Co.*, 340 U. S. 76, 81 (1950).

[2] *Associated Press* v. *United States*, supra.

[3] 118 C. Cls. xi, xii.

the Court of Claims[4] under the Revised Rules adopted May 15, 1951 makes it desirable that the Court grant certiorari. The Court has itself given recognition to the importance of having the summary judgment procedure clearly delineated. In *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 621 (1944) the Court said, "The importance of questions raised under the summary judgment rule led us to grant certiorari".

In actions in the District Courts under the Federal Rules of Civil Procedure motions for summary judgment have been granted and on appeal to the Courts of Appeal so frequently reversed and remanded because of the presence of a genuine issue as to a material fact, that it has been said, "It appears to be somewhat difficult to persuade the district courts of this; but we are satisfied that it is true".[5] and, "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment".[6] and "The motion for summary judgment . . . should be granted only where it is perfectly clear that no issue of fact is involved and inquiry is not desirable to clarify the law".[7] and, "Another of those all too numerous instances of the misuse of summary judgment procedure to cut a trial short".[8]

In actions before the Court of Claims litigants have not the benefit of review by the Courts of Appeals, since the Court of Claims is of the same rank and review is only obtainable on certiorari granted by the Court.[9] In normal

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[4] In the opinions rendered by the Court of Claims since May 15, 1951 and until the date of the filing of this petition for certiorari, motions for summary judgment were made in 80 cases.

[5] *Bozant* v. *Bank of New York*, 2d Cir., 1946, 156 F. 2d 787, 790.

[6] *Doehler Metal Furniture Co.* v. *United States*, 2d Cir., 1945, 149 F. 2d 130, 135.

[7] *Stevens* v. *Howard D. Johnson Co.*, 4th Cir., 1950, 181 F. 2d 390, 393.

[8] *Gray Tool Co.* v. *Humble Oil & Refining Co.*, 5th Cir., 1951, 186 F. 2d 365.

[9] 28 U. S. C. sect. 1255(1).

procedure before the Court of Claims cases are tried before a Commissioner who hears the evidence and views the witnesses and whose findings of fact and conclusions are reviewed by the Court of Claims upon briefs and arguments by the parties as if the Commissioner were the District Court and the Court of Claims were the Court of Appeals.[10] But in summary judgment procedure, involving as it does a determination of the question whether there be a genuine issue of fact, the Commissioner does not participate but the Court of Claims hears the motion. If error is committed in what is essentially a question of evidence, the determination of the existence of a genuine factual issue, then review is only by certiorari from the Court.

The care which should be exercised by the Court of Claims in acting on motions for summary judgment so as not to deprive litigants of an opportunity of presenting their side of a case is a question of such importance that review by the Court and the delineation for the Court of Claims of its summary judgment authority is required.[11]

The importance of the delineation of summary judgment procedure in the Court of Claims is realized when it is considered that it is the forum in which are brought many of the claims against the United States and that in certain respects this jurisdiction is exclusive.[12]

Summary judgment is a new and drastic remedy in the Court of Claims. It permits the Court of Claims to deny to any litigant a trial of the issues. It bars a litigant from cross-examining hostile witnesses[13] and from offering the evidence of his own witnesses.

Such tremendous power is easily abused. Summary judg-

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[10] Revised Rules of the Court of Claims adopted May 15, 1951.

[11] *Smyth* v. *United States*, 302 U. S. 319, 351 (1937); *Kennedy* v. *Silas Mason*, 334 U. S. 249, 256 (1948).

[12] 28 U. S. C. sects. 1491 to 1505; see also 28 U. S. C. sects. 1346.

[13] *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 628 (1943).

ment will of course be sought by respondent in every case before the Court of Claims in which it desires to avoid trial as in this case. Trial is the protection of claimants before the Court of Claims. Unless closely supervised and safeguarded, summary judgment will be used in many cases before the Court of Claims to break down the protection offered by trial. Summary judgment lends itself well to those who seek to "make the worse appear the better cause" especially to one trying to hide facts from the searching light of trial.

The importance of summary judgment procedure under the Revised Rules of the Court of Claims adopted May 15, 1951 makes it desirable that the Court promptly and unmistakably inform bench and bar of the limits within which summary judgment may be granted.

2. *The Action of the Court of Claims in directing entry of summary judgment for respondent is inconsistent with decisions of the Courts of Appeals.*

As stated, Rule 51 of the Revised Rules of the Court of Claims, adopted May 15, 1951 is derived from Rule 56 of the Federal Rules of Civil Procedure.[14] Both rules provide for the entry of summary judgment only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Court of Claims and the District Courts have concurrent jurisdiction in contract claims against the United States where the amount involved does not exceed $10,000: 28 U. S. C. sect. 1491, 28 U. S. C. sect. 1346, and the decisions of the District Courts are subject to review by the Courts of Appeals. The Court has granted certiorari to the Court of Claims because of conflict of its decisions

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[14] Supra, p. 6, note 3.

with decisions of the Courts of Appeals[15] and to the Courts of Appeals because of conflict of their decisions with decisions of the Court of Claims.[16]

In the interest of proper administration of justice there should be only one definition of a "genuine issue as to any material fact" in determining the propriety of summary judgment in both the Court of Claims and the Courts of Appeals.

This case demonstrates that the Court of Claims has granted respondent's motion for summary judgment when there are genuine issues as to material facts and its decision is in consequence inconsistent with decisions of the Courts of Appeals. To correct this inconsistency, certiorari should be granted.

In the opinion, the Court of Claims said (R. 5):

> "Defendant's motion for summary judgment is based upon the ground that plaintiff's claim of April 10, 1946, was a claim under Section 17a of the Contract Settlement Act, although not specifically designated as such, and that plaintiff is, therefore, barred from maintaining this suit under Section 13 of the Contract Settlement Act. We are of the opinion that this position of the defendant is well taken and that its motion for summary judgment must be allowed."

Petitioner contended that its claim of April 10, 1946 was not a claim under Section 17a of the Contract Settlement Act of 1944. The Court of Claims resolved this issue of fact in respondent's favor.

Certainly if petitioner had not intended by its claim of

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[15] *United States* v. *Benedict*, 338 U. S. 692, 695 (1949); *Rosenman* v. *United States*, 323 U. S. 658, 661 (1944); *United States* v. *Standard Rice Co.*, 323 U. S. 106, 107 (1944).

[16] *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 420, 423 (1943); *Neuberger* v. *Commissioner*, 311 U. S. 83, 85 (1940); *Helvering* v. *Midland Mut. Life Ins. Co.*, 300 U. S. 216, 220 (1937).

April 10, 1946 to make a claim under Section 17a of the Contract Settlement Act of 1944, it could not be held to have done so, and "intention" is a question of fact which may not be ruled upon on a motion for summary judgment: *Butcher* v. *United Electric Coal Co.,* 7th Cir., 1949, 174 F. 2d 1003, 1006, where the question was whether a release was intended to cover a specific claim; *Minor* v. *Washington Terminal Co.,* D. of C. Court of Appeals, 1950, 180 F. 2d 10, 11, where the question was whether the plaintiffs knew of a grievance procedure; *Furton* v. *City of Menasha,* 7th Cir., 1945, 149 F. 2d 945, 947, where the question was whether bed rock representations in drawings amounted to warranties; *Kasper* v. *Baron,* 8th Cir., 1951, 191 F. 2d 737, 738, where it was contended that a husband and wife partnership existed, although every return to city, state, and federal government, tax or otherwise, indicated the contrary; *Fogelson* v. *American Woolen Co.,* 2d Cir., 1947, 170 F. 2d 660, 662, where the question was whether in establishing a pension plan it was the sole purpose of the board of directors to favor the president; *Hunter* v. *Mitchell,* D. of C. Court of Appeals, 1950, 180 F. 2d 763, 765 where the question was whether a reduction in force or a reorganization plan was intended; *Dewey* v. *Clarke,* D. of C. Court of Appeals, 1949, 180 F. 2d 766, 770 where the question was whether a landlord seeking possession of rented property intended to occupy it as a dwelling or to convert it into co-operative apartments; *Avrick* v. *Rockmont Envelope Co.,* 10th Cir., 1946, 155 F. 2d 568, 573: "where . . . the court is necessarily required to resolve the question of alleged intent in arriving at its judgment, we are of the opinion that justice can best be served by a trial of the question on its merits;" *Hawkins* v. *Frick-Reid Supply Corporation,* 5th Cir., 1946, 154 F. 2d 88, 89: "while the construction of a contract is ordinarily for the court,

if the terms are ambiguous, and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact."

This case was before the Office of Contract Settlement Appeal Board which resolved the factual question involved against petitioner. Its opinion demonstrates that there is a genuine issue of fact: (R. 94)

> "That claim was made by letter of April 10, 1946 and was expressed to be for additional costs. The letter was not in the form required for section 17(a) claims and made no reference to that section or any regulation under it . . .
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> * * * * * * *
>
> ". . . Appellant seems to have wanted formalization of change orders that were unenforcible under the changes article of the contract because issued informally. Perhaps, to its thinking, a request to the Government to formalize the change orders as a matter of grace so that the additional costs would be payable under the changes article would not have to be considered a claim under the contract . . .
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> * * * * * * *
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> "The fact that the contracting officer required the assertion of a new claim as to the allowable portion leaves open the possibility that the original claim was not made as to either portion under Procurement Regulation 308-H . . .
>
> "We cannot, however, say that the April 10, 1946, claim was not made and denied under Section 17(a). The evidence is, at best equivocal.
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> "The burden is always on one who seeks action from a court to show that the court has jurisdiction . . . the best that appellant can do is to show that the evidence on this question is equivocal. Appellant has not therefore, sustained the burden of proof . . ."

Under this review of the evidence it must be concluded that a genuine issue as to a material fact exists. The weight of the evidence, or its credibility cannot be determined on a motion for summary judgment under the rule in the Courts of Appeals, and the burden rests upon the party making the motion: *Sarnoff* v. *Ciaglia,* 3d Cir., 1947, 165 F. 2d 167, 168; *Colby* v. *Klune,* 2d Cir., 1949, 178 F. 2d 872, 873; *Wittlin* v. *Giacalone,* D. of C. Court of Appeals, 1946, 154 F. 2d 20, 21; *Arnstein* v. *Porter,* 2d Cir., 1946, 154 F. 2d 464, 469: "Although part of plaintiff's testimony on deposition . . . does seem 'fantastic', yet plaintiff's credibility, even as to those improbabilities, should be left to the jury;" *Doehler Metal Furniture Co.* v. *United States,* 2d Cir., 1945, 149 F. 2d 130, 135; "A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable;" *Firemen's Mut. Ins. Co.* v. *Aponang Mfg. Co.,* 5th Cir., 1945, 149 F. 2d 359; 363: "Only when the evidence is such that it is clear the jury would have none to go on, though they believed that unfavorable to the movant for summary judgment, can the motion be sustained and a jury trial denied."

The Court of Claims concluded that petitioner had intended by its letter dated April 10, 1946 (R. 6) a claim under Sect. 17a of the Contract Settlement Act of 1944 because petitioner had under the release contained in the February 16, 1946 agreement (R. 57) no other rights left. But certainly there have been litigants who blindly pursued remedies denied them by prior releases,[17] and it was never contended that they did not pursue such remedies. Hence the release was not conclusive and it was error for the Court of Claims to so consider it.

Petitioner contended that Leonard A. Wells, contracting officer at Chicago AAF Procurement Field Office, who

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[17] *St. Louis, K. & S. E. R.* v. *United States,* 267 U. S. 346 (1925).

signed the letters dated July 25, 1946 (R. 63) and October 9, 1946 had no authority to act upon requests for relief under Sect. 17a of the Contract Settlement Act of 1944, because by regulation such authority was restricted to chiefs of the technical services,[18] and because the letters themselves indicated that he did not thereby exercise authority under Sect. 17a. The Office of Contract Settlement Appeal Board believed it significant that Wells stated that a new claim was required for the portion allowable under Sect. 17a. (R. 96)

The Court of Claims in entering summary judgment for respondent denied petitioner the right to cross-examine respondent's witnesses, including Leonard A. Wells, which was inconsistent with *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 628 (1943) and Courts of Appeals' decisions.[19]

The Court of Claims considered of great weight the fact that petitioner's claim filed January 30, 1948 was "in all material respects the same in substance as the claim of April 10, 1946," but it ignored the allegation (R. 75) that the claim of April 10, 1946 was only a revision of the original request for price increase, dated September 7, 1945 (R. 11) to which the claim of April 10, 1946 is not only similar but almost identical, and the further allegation that it was not until August 5, 1946 that petitioner made a claim under Section 17a of the Contract Settlement Act of 1944. (R. 76) In rejecting petitioner's allegations and entering summary judgment for respondent, the decision below was inconsistent with decisions of the Courts of Appeals, since the Court of Claims chose to accept respondent's version

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[18] Appendix, p. 18.

[19] *Detsch & Co.* v. *American Products Co.*, 9th Cir., 1945, 152 F. 2d 473, 475; *Boro Hall Corporation* v. *General Motors Corporation*, 2d Cir. 1947, 164 F. 2d 770, 772; *Colby* v. *Klune*, 2d Cir., 1949, 178 F. 2d 872, 874; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3d Cir., 1942, 130 F. 2d 1016, 1022.

of the facts and to reject petitioner's version, which is contrary to the rule established under F. R. C. P. Rule 56: *Sarnoff* v. *Ciaglia,* 3d Cir., 1947, 165 F. 2d 167, 168; *Merchants' Indemnity Corporation of New York* v. *Peterson,* 3d Cir., 1940, 113 F. 2d 4, 5; *Begnaud* v. *White,* 6th Cir., 1948, 170 F. 2d 323, 327.

In the present case there has been no trial and the Court of Claims in granting respondent's motion for summary judgment has denied petitioner the opportunity of establishing by presentation of its evidence and by cross-examination of respondent's witnesses that its letter dated April 10, 1946 was not a claim under Sect. 17a of the Contract Settlement Act of 1944, that it was not at the time so considered by respondent, and that respondent's employee, Leonard A. Wells, had no authority under Sect. 17a of the Contract Settlement Act of 1944 to deny a claim thereunder.

The Court of Claims in entering summary judgment for respondent has placed a construction upon its Rule 51 in a manner inconsistent with the construction placed upon Rule 56 of the Federal Rules of Civil Procedure by the Courts of Appeals. To ensure the orderly administration of justice, certiorari should be granted.

Conclusion

The issue petitioner raises is important, yet so simple and clear-cut that the Court could resolve it without extended argument, or, indeed, any argument. Certiorari should be granted and the Court of Claims ordered to remand the case for trial.

Respectfully submitted,

EDWIN J. MCDERMOTT,
Counsel for Petitioner.

Appendix

Rules of the United States Court of Claims
Revised May 15, 1951

Rule 51. Summary Judgment

* * * * * * *

(b) For Defending Party: A party against whom a claim or counterclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7 (b) for filing a response thereto. Such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * * * *

Contract Settlement Act of 1944 (Act July 1, 1944, C. 358, Sect. 17, 58 Stat. 665, 41 U. S. C. Sect. 101-125).

41 U. S. C. Sect. 117. Defective, informal and quasi contracts.

(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract,

relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor

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(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of Section 113 of this title.

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41 U. S. C. Sect. 113.

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(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election——

(1) Appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) Bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)) • • •

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

• • • • • • •

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, • • • or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceed-